

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL B. FLEMING,

No.: CV-12-59-EFS

Plaintiff,

**ORDER GRANTING DEFENDANT'S
SUMMARY-JUDGMENT MOTION AND
DENYING PLAINTIFF'S SUMMARY-
JUDGMENT MOTION**

MICHAEL ASTRUE, Commissioner of
Social Security,¹

Defendant.

Before the Court, without oral argument, are cross-summary-judgment motions. ECF Nos. 14 & 16. Plaintiff Michael B. Fleming appeals the Administrative Law Judge's (ALJ) denial of benefits. ECF No. 6. Mr. Fleming contends the ALJ failed to fully consider the opinions of his treating and examining sources and therefore the ALJ's determination that he has the psychological ability to work is unsupported by the record. The Commissioner of Social Security ("Commissioner") asks the Court to affirm the ALJ's decision.

¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Federal Rule of Civil Procedure 25(d), Ms. Colvin is substituted for Michael J. Astrue as the Defendant in this lawsuit. No further action need be taken to continue this lawsuit. 42 U.S.C. § 405(g).

1 After reviewing the record and relevant authority, the Court is
2 fully informed. For the reasons set forth below, the Court affirms the
3 ALJ's decision and therefore denies Mr. Fleming's motion and grants the
4 Commissioner's motion.

5 **A. Statement of Facts²**

6 At the time of the administrative hearing, Mr. Fleming was fifty-
7 three years old. ECF No. 11 at 28. He was not present at the
8 administrative hearing because he was incarcerated at the Spokane County
9 Jail. *Id.* at 43, 111.

10 Mr. Fleming attended mainstream courses at school but he dropped
11 out of school in the tenth grade. *Id.* at 23. Records show that Mr.
12 Fleming was employed from 1973-80, 1984, 1988-89, and 1993-94 in some
13 capacity. *Id.* at 122.

14 **B. Procedural History**

15 In April 2010, Mr. Fleming filed for Supplemental Security Income
16 benefits (hereinafter, "claim for benefits"), alleging an onset of
17 disability beginning February 1, 2005, due to alcohol abuse, diabetes,
18 depression, Borderline Intellectual Functioning, antisocial personality
19 disorder, and a history of polysubstance dependence. ECF No. 11 at 115-
20 21. His claim for benefits was denied, *id.* at 63-66, and his request
22 for reconsideration of that denial was denied, *id.* at 70-75. Mr.
23 Fleming then requested an administrative hearing, which was held on
24 September 16, 2010, before ALJ Marie Palachuk. *Id.* at 41-60, 76. At

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² The facts are only briefly summarized. Detailed facts are
27 contained in the administrative hearing transcript, the ALJ's decision,
28 and the parties' briefs.

1 the hearing, the alleged onset date was amended to April 16, 2010. *Id.*
2 at 19. On May 20, 2011, the ALJ denied Mr. Fleming's claim for
3 benefits, determining that notwithstanding Mr. Fleming's non-exertional
4 limitations he had the capacity to perform medium-exertional work as an
5 industrial cleaner, a production helper, and a laundry worker. *Id.* at
6 16-34. The Appeals Council thereafter denied Mr. Fleming's request for
7 review. *Id.* at 1-6, 14-15.
8

9 On January 23, 2012, Mr. Fleming filed this lawsuit, claiming the
10 ALJ's decision is not supported by substantial evidence. ECF Nos. 1 &
11 6. On September 13, 2012, Mr. Fleming filed his Motion for Summary
12 Judgment, ECF No. 14, and on October 29, 2012, the Commissioner filed
13 her Motion for Summary Judgment, ECF No. 16.
14

C. Disability Determination

15 A "disability" is defined as the "inability to engage in any
16 substantial gainful activity by reason of any medically determinable
17 physical or mental impairment which can be expected to result in death
18 or which has lasted or can be expected to last for a continuous period
19 of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A),
20 1382c(a)(3)(A). The decision-maker uses a five-step sequential
21 evaluation process to determine whether a claimant is disabled. 20
22 C.F.R. §§ 404.1520, 416.920.
23

24 Step one assesses whether the claimant is engaged in substantial
25 gainful activities. If he is, benefits are denied. 20 C.F.R. §§
26 404.1520(b), 416.920(b). If he is not, the decision-maker proceeds to
27 step two.
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Step two assesses whether the claimant has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does not, the disability claim is denied. If the claimant does, the evaluation proceeds to the third step.

Step three compares the claimant's impairment with a number of listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App. 1, 416.920(d). If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment does not, the evaluation proceeds to the fourth step.

Step four assesses whether the impairment prevents the claimant from performing work he has performed in the past by examining the claimant's residual functional capacity. 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant is able to perform his previous work, he is not disabled. If the claimant cannot perform this work, the evaluation proceeds to the fifth step.

Step five, the final step, assesses whether the claimant can perform other work in the national economy in view of his age, education, and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); see *Bowen v. Yuckert*, 482 U.S. 137 (1987). If the claimant can, the disability claim is denied. If the claimant cannot, the disability claim is granted.

The burden of proof shifts during this sequential disability analysis. The claimant has the initial burden of establishing a *prima*

1 facie case of entitlement to disability benefits. *Rhinehart v. Finch*,
 2 438 F.2d 920, 921 (9th Cir. 1971). The burden then shifts to the
 3 Commissioner to show 1) the claimant can perform other substantial
 4 gainful activity, and 2) that a "significant number of jobs exist in the
 5 national economy," which the claimant can perform. *Kail v. Heckler*, 722
 6 F.2d 1496, 1498 (9th Cir. 1984). A claimant is disabled only if his
 7 impairments are of such severity that he is not only unable to do his
 8 previous work but cannot, considering his age, education, and work
 9 experiences, engage in any other substantial gainful work which exists
 10 in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

12 **D. Standard of Review**

13 On review, the Court considers the record as a whole, not just the
 14 evidence supporting the ALJ's decision. See *Weetman v. Sullivan*, 877
 15 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525,
 16 526 (9th Cir. 1980)). The Court upholds the ALJ's determination that
 17 the claimant is not disabled if the ALJ applied the proper legal
 18 standards and there is substantial evidence in the record as a whole to
 19 support the decision. *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
 20 1983) (citing 42 U.S.C. § 405(g)); *Brawner v. Sec'y of Health & Human
 21 Servs.*, 839 F.2d 432, 433 (9th Cir. 1987) (recognizing that a decision
 22 supported by substantial evidence will be set aside if the proper legal
 23 standards were not applied in weighing the evidence and making the
 24 decision). Substantial evidence is more than a mere scintilla, *Sorenson
 25 v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a
 26 preponderance, *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir.
 27
 28

1 1989); *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576
 2 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind
 3 might accept as adequate to support a conclusion." *Richardson v.*
 4 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch
 5 inferences and conclusions as the [ALJ] may reasonably draw from the
 6 evidence" will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293
 7 (9th Cir. 1965). If the evidence supports more than one rational
 8 interpretation, the Court must uphold the ALJ's decision. *Allen v.*
 9 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

11 **E. Analysis**

12 Mr. Fleming contends the ALJ failed to properly consider the
 13 opinions of his treating and examining sources (Paul Martin, M.A., Dr.
 14 John Arnold, and Dr. David Deutsch) and therefore the ALJ erroneously
 15 determined Mr. Fleming retains the psychological ability to perform
 16 medium-exertional work. Below the Court addresses each medical
 17 provider.

18 As to Paul Martin, M.A., ECF No. 11 at 323-30, the ALJ gave little
 19 weight to his opinions for the following four reasons: 1) "[Department
 20 of Social and Health Services (DSHS)] regulations are different than
 21 those relied upon by the Agency," 2) Mr. Martin used a "check box" form
 22 to identify the majority of Mr. Fleming's limits without offering
 23 specific clinical or objective findings to support those limits, 3) he
 24 failed to "differentiate between the psychological symptoms and those of
 25 substance abuse effect," and 4) he is not an "acceptable medical source"
 26 as defined in 20 C.F.R. § 516.913(a). *Id.* at 27. Mr. Fleming contends
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1 these four reasons are unsupported by the record. The Court disagrees.
2 First, the ALJ properly considered the differences between the DSHS
3 regulations and the social security regulations and how those
4 differences impact the basis for Mr. Martin's opinions. Second, while
5 Mr. Martin supplemented his check-the-box-format opinions with written
6 comments, his comments were often based solely on his observations of
7 Mr. Fleming or on Mr. Fleming's statements during the evaluation. In
8 regard to his opinion that Mr. Fleming is markedly limited in his
9 "[a]bility to maintain appropriate behavior in a work setting," the
10 "Your observation" comment states, "Mr. Fleming says he tried to get
11 along with people, but he isn't into "Be-Bop" and doesn't like loud
12 mouth people." *Id.* at 326. This comment is based simply on Mr.
13 Fleming's own statement; there is no other information in Mr. Martin's
14 report that supports an objective finding that Mr. Fleming is markedly
15 limited in his ability to maintain appropriate behavior in a work
16 setting. In fact, other aspects of Mr. Martin's report do not support
17 this "marked" limitation, including the statements: 1) "This man has
18 some ability to work some jobs, but doesn't deal with stress; he used to
19 hold his stress inside and go get drunk," *id.* at 326, and 2) "Inmate
20 says that sometimes he needs mental health treatment and sometimes he
21 doesn't. He needs to stay clean and sober. If he does he should be
22 allright [sic]," *id.* at 327. Therefore, the ALJ appropriately concluded
23 that Mr. Martin's check-the-box limitation findings were not supported
24 by clinical or objective findings. The Court also finds the ALJ's
25 conclusion that Mr. Martin failed to "differentiate between
26

1 psychological symptoms and those of substance abuse effect" is supported
 2 by the record. Finally, the Court finds the ALJ appropriately
 3 identified Mr. Martin as not an acceptable medical source under 20
 4 C.F.R. § 416.913(a). And notwithstanding the ALJ's recognition that Mr.
 5 Martin is not listed as an acceptable medical source, the ALJ still
 6 appropriately considered Mr. Martin's opinions and then discredited them
 7 for the identified reasons.

8 As to Dr. John Arnold, the Court also finds the ALJ's decision to
 9 discredit Dr. Arnold's opinions is supported by substantial evidence.
 10 The ALJ recognized that Dr. Arnold's opinions regarding a rule-out
 11 psychotic disorder were unsupported given that there was no prior
 12 medical record supporting a symptom of auditory hallucinations by Mr.
 13 Fleming and it was medically unlikely that such symptoms would appear so
 14 suddenly. The ALJ also discussed that Dr. Arnold's moderate-limit
 15 findings were largely based on Mr. Fleming's self-reports regarding his
 16 limitations and symptoms. The record is sufficient to justify the ALJ's
 17 finding that Mr. Fleming is not a credible historian or reporter.
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19 As to Dr. David Deutsch, he completed a Certification for Medicaid
 20 ("Certification") on August 4, 2010. The Certification simply states:

21 53 yr old male with Adjustment [Disorder] with Depressed Mood.
 22 Personality [Disorder] with antisocial and paranoid features.
 23 Borderline Intellectual Functioning. GAF 57. Duration Duration
 24 not listed but appears Longter. Meets listing 12.04 12.08.
 FSIQ 70.

25 ECF No. 11 at 414 (misspellings in original). Mr. Fleming highlights
 26 the ALJ failed to explain why she rejected Dr. Deutsch's opinion that
 27 Mr. Fleming's impairments meet the listing criteria for affective

1 disorders or personality disorders. However, the ALJ need not address
2 each particular piece of evidence or medical opinion in her order. The
3 ALJ's order sufficiently identifies that she concluded, "[Mr. Fleming]
4 has reported whatever he felt was necessary at the time to achieve his
5 goals. He appears to have misled various medical providers and
6 exaggerated and manufactured symptoms on an as needed basis." ECF No.
7 11 at 26. The ALJ's denial of benefits is supported by substantial
8 evidence and she need not explain why she did not credit Dr. Deutsch's
9 conclusory statements on the Certificate. See *Howard ex rel. Wolff v.*
10 *Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) ("[I]n interpreting the
11 evidence and developing the record, the ALJ does not need to discuss
12 every piece of evidence.") (internal quotation removed).

14 **F. Conclusion**

15 In summary, the Court finds the record contains substantial
16 evidence from which the ALJ properly concluded, when applying the
17 correct legal standards, that Mr. Fleming does not qualify for benefits.

18 For the above-given reasons, **IT IS HEREBY ORDERED:**

- 20 1. Mr. Fleming's Motion for Summary Judgment, **ECF No. 14**, is
21 **DENIED**.
- 22 2. The Commissioner's Motion for Summary Judgment, **ECF No. 16**,
23 is **GRANTED**.
- 24 3. **JUDGMENT** is to be entered in the Commissioner's favor.

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1 4. The case shall be **CLOSED**.

2 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
3 Order and provide copies to counsel.

4 **DATED** this 3rd day of September 2013.

5
6 s/Edward F. Shea
7 EDWARD F. SHEA
8 Senior United States District Judge